IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Petitioners*,

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent*.

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. p. 51)[1] is reported at 532 F.2d 431. The opinion of the United States District Court for the Eastern District of Louisiana (App. p. 44) is reported at 1975-1 CCH Trade Cases ¶ 60,240.

JURISDICTION

The judgment of the court of appeals (App. p. 59) was entered on May 27, 1976. On June 9, 1976 the City of Lafayette, Louisiana and the City of Plaque-

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[1] "App." references are to pages of the Appendix filed with this Court pursuant to Rule 36.

mine, Louisiana (hereinafter "Cities") timely filed a petition for rehearing *en banc*. (App. p. 59). The court of appeals entered an order denying the Cities' petition for rehearing on October 4, 1976. (App. p. 75). The Cities' petition for a writ of certiorari was filed on December 22, 1976. The petition was granted on March 28, 1977. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

At issue is the intended scope of the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§1, 2 and Section 3 of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §14. (These statutory provisions are printed in the Addendum to this Brief).

QUESTION PRESENTED

The question presented is whether city governments, political subdivisions of a state, are subject to causes of action and treble damage liability under the federal antitrust laws. (15 U.S.C. §1 *et. seq.*)

STATEMENT OF THE CASE

The issue before this Court arises from the district court's dismissal of an amended counterclaim filed by the respondent Louisiana Power & Light Company (hereinafter "LP&L") in *City of Lafayette, Louisiana and City of Plaquemine, Louisiana* v. *Louisiana Power & Light Company et al.* Civil Action No. 73-1970, Section "E" (E.D.La.), an action filed by the Cities on July 24, 1973. The Cities' complaint (App. p. 6) alleged that LP&L combined and conspired with other privately owned utilities to restrain and monopolize interstate commerce in the generation, transmission and sale of electric power and energy in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2.

The counterclaim in turn alleged that the Cities violated the federal antitrust laws in the operation of their municipal electric utility systems.[2] Four separate allegations are contained in the counterclaim as amended: that the Cities engaged in sham and frivolous litigation against LP&L before several federal regulatory agencies, the United States Department of Justice and the federal courts in connection with LP&L's planned construction of a nuclear electric generating facility (App. pp. 19, 24-25); that the Cities each included in their municipal utility bonds covenants with the bondholders to exclude competition from other utilities in the provision of electric power and energy within their municipal boundaries

[2] The Cities as political subdivisions of the State of Louisiana are empowered by the Constitution of the State of Louisiana to exercise any governmental power not inconsistent with the state constitution and not denied by their charter or by general laws. *See*, Article VI, Section 7(a) of the Constitution of the State of Louisiana. (*See*, Article XIV, Section 40(d) of the constitution in effect prior to January 1, 1975.) Further, a Louisiana statute provides that cities may "acquire by condemnation or otherwise, construct, own, lease and operate and regulate public utilities within or without the corporate limits of the city subject only to restrictions imposed by general law for the protection of other communities." Louisiana Acts 1918, No. 160, §3 (LSA-RS 33:621); *See also*, LSA-RS 33:1326, 4162, 4163. These constitutional and statutory provisions are set forth in the Addendum to this Brief.

(App. p. 19); that the Cities had agreed with others for the provision of electric power and energy in their market areas for a term longer than that lawful under state law in an attempt to exclude competition in such markets (App. p. 19); and that the City of Plaquemine contracted with certain customers to provide water and gas service on the condition that such customers also purchase electricity from the City. (App. p. 33). LP&L alleged that its damages resulting from the Cities' conduct exceed $180 million. (App. p. 20).

On March 3, 1975 the district court, citing *Parker* v. *Brown,* 317 U.S. 341 (1943), ruled that the Cities engaging in "purely state government activities are not subject to the requirements of the antitrust laws of the United States," (App. p. 48), and dismissed LP&L's amended counterclaim. Final judgment on LP&L's amended counterclaim was entered pursuant to Rule 54(b), Fed. R. Civ. P., on March 13, 1975 (App. p. 48), and an appeal was taken by LP&L to the Fifth Circuit. (App. p. 49).

In an opinion dated May 27, 1976, (App. p. 51) the Fifth Circuit relied upon its interpretation of *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), to hold "that the district court erred in holding the Cities' actions to be automatically beyond the reach of the federal antitrust laws." (App. p. 58). It ruled that state governmental bodies, to avoid antitrust liability, must show that the state legislature in granting authority to the governmental bodies specifically contemplated the alleged anticompetitive restraint and that "the challenged activity was clearly within the legislative intent." (App. p. 54). On

October 4, 1976 the court of appeals denied without comment the Cities' petition for rehearing *en banc.* (App. p. 75).

SUMMARY OF ARGUMENT

This Court in *Parker* v. *Brown,* 317 U.S. 341 (1943), held that the Sherman Act does not apply to state government. It found that the Sherman Act was aimed at private anticompetitive conduct, and concluded that Congress did not intend to prohibit actions of a state. Despite *Parker's* firm conclusions as to the scope of Sherman Act coverage, the Fifth Circuit, relying upon *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), ruled that the Cities, political subdivisions of the State of Louisiana, are susceptible to a suit for treble damages under the antitrust laws. This ruling fails to recognize the critical distinction between *Goldfarb* and this action. *Goldfarb* involved actions by an organization of private attorneys which had been given only limited state functions, and did not purport to rule that wholly governmental state bodies, such as municipalities, are subject to prosecution under the federal antitrust laws.

This Court's later decision in *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976), demonstrates that *Goldfarb* did not retreat from *Parker's* conclusion that the Sherman Act does not apply to state government. Moreover, since a city is merely a subdivision of a state and only exercises power delegated to it by the state, *Parker's* findings regarding the congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions.

Indeed, the Ninth Circuit so held in *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974).

Under the Fifth Circuit's ruling, the Cities will be subject to antitrust liability unless they can prove that the state legislature authorized and intended their specific conduct. This "legislative mandate" test and the confusion it will cause illustrates the propriety of *Parker's* conclusion and the wisdom of excluding municipalities from the application of the antitrust laws. A test of this nature is appropriate to determine the degree of governmental compulsion when private interests are involved. But truly governmental bodies operating under the direction of elected public officials present no question of private interests seeking immunity or masquerading under the banner of state action. It makes no sense to determine whether the state has compelled itself to engage in the challenged activities. In *New Mexico*, the court specifically held the legislative mandate test was unnecessary where there is no doubt that the defendant is a state governmental body.

A legislative mandate test will create great uncertainty in state and local government. In most instances state legislatures delegate power and authority to subordinate state bodies in general terms. This is done to provide local government with the flexibility necessary to accommodate local needs and unforeseen events. The legislative mandate test will either require the states to redraft their delegations of authority in specific and limiting terms or leave local officials uncertain as to whether their activities may be subject to antitrust attack.

Beyond the problems which will be caused by the vagaries of the Fifth Circuit's standard, inestimable disruption of local government will result if the federal antitrust laws are applied to municipal governments. Local governments provide a broad range of services, all of which will be subject to antitrust attack. The threat of such suits with their high costs and possible treble damage judgments will have a chilling effect upon local decision making and paralyze the functions of local government.

Both the Fifth Circuit's holding, and LP&L's argument that the Cities should be treated like private corporations for antitrust purposes, ignore the express purposes of the antitrust laws and the fundamental differences between private and public bodies. Governmental entities operate in the public interest, not for private gain, and their officials are subject to removal from office if their actions do not meet the expectations of the electorate. The federal antitrust laws with their unique remedies were designed to protect the public from abuses of private economic power and are plainly unsuited to resolve disputes over the propriety of local governmental action.

ARGUMENT

1. The Federal Antitrust Laws Are Inapplicable To Municipal Governments.

A. *Parker* Found That Direct Governmental Action Was Not Subject To The Antitrust Laws, and *Goldfarb* Did Not Alter That Finding.

This case directly raises the question whether Congress intended the federal antitrust laws to apply

to the actions of state political subdivisions. Although this precise question has not heretofore been addressed by this Court, the issue is among those embraced by the state action doctrine articulated in *Parker* v. *Brown*, 317 U.S. 341 (1943).[3]

In *Parker* v. *Brown* the Court undertook to examine the Sherman Act and its legislative history to determine whether the Congress intended the Act to apply to the states and restrain them in the exercise of their governmental authority. In so doing, the Court found that "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action," and that "[t]here is no suggestion of a purpose to restrain state action in the Act's legislative history." 317 U.S. at 351. The Court concluded, as it had before,[4] that the purpose of the Sherman Act was "to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations" (317 U.S. at 351) and "must be taken as a prohibition of

[3] The issue is not one of immunity from the antitrust laws, nor is it whether the federal statutes supersede or preempt the acts of state governmental bodies. Rather, as is evident from the *Parker* v. *Brown* decision itself, the question is whether Congress intended to apply the antitrust laws to state action at all. 317 U.S. at 350-352. *See also, E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52, 56 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); Handler, *The Current Attack on the Parker* v. *Brown State Action Doctrine*, 76 Colum.L.Rev. 1, 9-10 (1976).

[4] *See, Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 491-93 (1940); *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 50 (1911).

individual and not state action." 317 U.S. at 352.[5] The clear message of *Parker*, then, is that Congress enacted the Sherman Act to outlaw anticompetitive conduct by private parties, not to interfere with government.

Notwithstanding *Parker's* strong restatements of congressional purpose, the Fifth Circuit ruled in this case that the federal antitrust laws can be applied to municipal governments, and that such political subdivisions of the state are subject to private suits seeking treble damages.[6] This ruling, a departure by the court of appeals from its previous decision in *Saenz* v. *University Interscholastic League*, 487 F.2d

[5] The Court repeated this position in *Eastern Rail. Pres. Conf.* v. *Noerr Motor Frgt., Inc.*, 365 U.S. 127 (1961) where, referring to *Parker*, Mr. Justice Black stated: "Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 136. (footnote omitted).

[6] In addition to allegations of Sherman Act violations by the Cities, LP&L's counterclaim, as amended, contains allegations that the City of Plaquemine violated Section 3 of the Clayton Act, 15 U.S.C. § 14. There is no basis for reaching a different conclusion regarding the Clayton Act's inclusion *vel non* of state governmental action within its prohibitions. The legislative history of the Clayton Act is similarly void of any intention to include state action. No distinction between the two Acts is drawn in *Cantor* v. *Detroit Edison Co., infra*, the only relevant case decided by this Court which included allegations under both Acts. And, in *Alabama Power Co.* v. *Alabama Electric Power Cooperative Inc.*, 394 F. 2d 672 (5th Cir.), *cert. denied*, 393 U.S. 100 (1968), the circuit court considered it "settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action." 394 F. 2d at 675.

1026 (5th Cir. 1973),[7] was based squarely upon *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), which the Fifth Circuit read to "require" its holding that "[a] subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws."[8] (App. p. 54).

The court of appeals viewed the Virginia State Bar, the object of this Court's *Parker* v. *Brown* analysis in *Goldfarb*, as a "state agency" or "governmental entity" (*See*, App. p. 53, App. p. 53 n. 5, App. p. 57) parallel in governmental status with the Cities. This reading of *Goldfarb* is simply contrary to the facts as stated in the decision. In *Goldfarb* the Court rejected the State Bar's *Parker* v. *Brown* defense because it found that this organization of private attorneys, although "a state agency for some limited purposes[,] . . . has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is

[7] The Fifth Circuit's *Saenz* decision stemmed from a private antitrust action brought by a slide rule manufacturer alleging that the University Interscholastic League ("UIL"), part of a bureau of the Extension Division of the University of Texas, had conspired with another slide rule manufacturer to thwart the use of the plaintiff's product in interscholastic competition. The district court granted the defendant's motion for summary judgment, dismissing the action on the grounds that the UIL was an agency of the state exempt from the Sherman Act. Relying upon the *Parker* v. *Brown* decision, the Fifth Circuit affirmed, agreeing that the UIL, as a governmental entity, was "outside the ambit of the Sherman Act." 487 F. 2d at 1028.

[8] This case involves direct actions of political subdivisions of a state which are wholly public bodies. In seeking reversal of the court of appeals' decision, the Cities do not seek to overrule *Goldfarb* or alter its effect in cases where private business or professional groups with limited governmental functions are charged.

beyond the reach of the Sherman Act." 421 U.S. 791-92. The Court recognized that, with respect to its alleged anticompetitive conduct, the State Bar was acting not as an agent of the state, but in the private pecuniary interests of its lawyer members. Under such circumstances the State Bar's activity was not state action and its limited official role could not "create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." 421 U.S. 791.

Mr. Justice Stewart's dissent in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), recognized that *Goldfarb* involved private not public conduct: "*Goldfarb* clarified *Parker* by holding that *private* conduct, if it is to come within the state-action exemption must not merely be 'prompted' but 'compelled' by state action," 428 U.S. at 637 (emphasis added). *See also*, *Id.* at 623-24.

The crucial element of private action in *Goldfarb* was completely neglected by the Fifth Circuit in applying that decision in this case. Private acts for private gain were at issue in *Goldfarb*, while this case involves direct acts of city government in the provision of municipal services. It is, therefore, manifest that the Fifth Circuit erred when it read *Goldfarb* to "require" a holding that municipal governments are within the intended scope of the federal antitrust laws. (App. p. 54).[9] The issue in this case was *not* "laid to rest by the Supreme Court in *Goldfarb*," (App. p. 57) as the court of appeals stated

[9] The Third Circuit has also misapplied *Goldfarb* in the same fashion, holding local governmental bodies subject to the antitrust laws. *Duke & Co. Inc.* v. *Foerster*, 521 F. 2d 1277 (3rd Cir. 1975).

below. *Goldfarb* does not detract from the conclusion in *Parker* v. *Brown* that the Sherman Act was not "intended to restrain state action" (317 U.S. at 351) and it does not support the application of the federal antitrust laws to the direct activities of municipal governments.[10]

Cantor v. *Detroit Edison Co., supra,* followed *Goldfarb* as the second decision of this Court to address the "state action doctrine" since *Parker* v. *Brown.* Although the holding of *Cantor* is not directly relevant to this case, the opinions are." The defendant, The Detroit Edison Company, argued unsuccessfully that its marketing practices, which had been approved as part of tariffs filed with the Michigan Public Service Commission, were beyond antitrust scrutiny.

The several opinions delivered in *Cantor* differed as to the appropriate circumstances under which the action of private parties subject to state economic regulation might be vulnerable to antitrust attack, but each opinion acknowledges that the federal antitrust laws do not apply to direct state action and actions by state officials. The plurality opinion of Mr. Justice Stevens reads *Parker* v. *Brown* as being limited to "official action taken by state officials." 428 U.S. at 591. Although criticized by the concurring and dissenting opinions as being too restrictive a reading of *Parker,* the rest of the Court affirms that *Parker* at least held the direct acts of state government to be outside the scope of the Sherman Act. *See,* Burger C.J., concurring, 428 U.S. at 603-04; Blackmun, J., concurring, *Id.* at 613-14 n. 5; Stewart, J., dissenting, *Id.,* at 623, 637-39.

The *Cantor* opinions recognize the critical distinction between private conduct endorsed or influenced to some degree by state action and direct governmental action, a distinction ignored by the court of appeals below. *Cantor* also reaffirms *Parker's* conclusion that Congress did not intend to include the actions of state governmental bodies within the prohibitions of the antitrust laws.

Although *Parker* and the various opinions in *Cantor* refer to the state, there is no reason to believe that Congress intended to treat local governments differently in the application of the antitrust laws. Neither the language of the Sherman or Clayton Acts nor their legislative histories provide any rationale for excluding state government from the application of the antitrust laws but requiring city government to be subject to them. Nor does *Goldfarb,* which speaks of actions of the state "as sovereign," (421 U.S. at 791) provide a basis for treating cities differently than the state. Municipalities are "instrumentalities of the state for the convenient administration of government within their limits," *Louisiana* v. *City of New Orleans,* 109 U.S. 285, 287 (1883), and accordingly "their powers are such as belong to sov-

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[10] The distinction between *Goldfarb* and this case is parallel to that offered by the United States to distinguish the *Goldfarb* decision in *Bates* v. *State Bar of Arizona,* No. 76-316, argued January 18, 1977. (Brief of the United States as Amicus Curiae at 15-18).

[11] *Cantor* involved private action "approved" as part of a scheme of state regulation of private business conduct. This case involves the direct acts of public bodies which are themselves charged with violations of federal law. The opinions in *Cantor* discuss the legal and policy distinctions to be drawn between these two kinds of "state action" cases.

ereignty," *Klein* v. *New Orleans*, 99 U.S. 149, 510 (1878). Municipalities, indeed, "exercise locally . . . the sovereign power of" the state. *Breard* v. *City of Alexandria, La.*, 341 U.S. 622, 640 (1951). *Accord, Vilas* v. *Manila*, 220 U.S. 345, 356 (1911). And what a state may properly do by direct action it may do through the public agency of a municipal body. *Read* v. *City of Plattsmouth*, 107 U.S. 568, 576 (1883). Thus, there is no basis in law or policy to differentiate between the "state" and the subordinate entities of government to which the state delegates it power and authority. Cities are creatures of the state exercising the state's powers. *Parker's* holding, therefore, applies with equal force to municipalities.

New Mexico v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974), the court of appeals ruling most directly in conflict with the Fifth Circuit's ruling in this case, rejected any distinction between the state and its political subdivisions. The State of New Mexico, on behalf of itself and all other public bodies in the state, brought suit against the Shell Oil Company and other suppliers of asphalt alleging violations of the federal antitrust laws. Shell in turn filed a counterclaim alleging antitrust violations by the state and various of its cities and counties. The district court dismissed the counterclaim holding the Sherman Act to be inapplicable to such governmental entities. The Ninth Circuit, in affirming, embraced the analysis of the language and history of the Sherman Act in *Parker*, noted that the Sherman Act is a criminal statute and concluded that "sections 1 and 2 of the Sherman Act do not apply to the activities of a state." 501 F.2d at 367. The *New Mexico* holding applied with equal force to the cities and counties

which were also named defendants in the counterclaim. 501 F.2d at 370 n. 5.[12]

New Mexico embodies the correct approach and answer to the question whether the federal antitrust laws apply to the actions of a state and its political subdivisions. The Ninth Circuit recognized the distinctions to be drawn between public and private acts, and carefully followed *Parker's* conclusion that Congress did not intend the Sherman Act to apply to action taken by the state. Nothing said by this Court in *Goldfarb* or *Cantor* conflicts with or detracts from *Parker* on this issue or from *New Mexico's* application of *Parker*. The Fifth Circuit's holding on the other hand, by allowing antitrust suits against political subdivisions of a state, strikes a blow at the very foundation of *Parker*.

B. The Legislative Mandate Test Should Not Be Applied To Municipalities and Would Offend Public Policy.

Under the legislative mandate test imposed by the court of appeals a municipality would have to prove that "the challenged activity was clearly within the legislative intent" (App. p. 54) in order to avoid treble damage liability or, indeed, criminal prosecution. The trier of fact in such cases would have the difficult job of determining whether "the legislature contemplated the kind of action complained of." (App. p. 55). The test is inappropriate to circum-

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[12] Authoritative commentary has also concluded that the state action doctrine of *Parker* v. *Brown* applies "where the defendants are either the states, one of its subdivisions or state officials acting under color of state authority or sovereignty." Handler, *The Current Attack on the Parker* v. *Brown State Action Doctrine*, 76 Colum. L. Rev. 1, 8-9, 16 (1976).

stances where governmental bodies are charged, and its consequences illustrate the folly of applying the federal antitrust laws to city government.

A test of this kind is appropriate when private bodies, including those with limited governmental functions, are involved. The federal antitrust laws were designed to curb abuses by private parties, and specific direction by the state should be required in order to insulate such private interests from prosecution under those statutes. The purpose of the test is to determine whether the government has compelled the activity in question. It makes no sense, however, to determine whether the state compelled action in cases where government itself is the actor. In such cases a court need only verify the precise identity and public character of the alleged antitrust violator.

This view is consistent with decisions of the courts of appeals prior to *Goldfarb*.[13] In *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966), the plaintiff, a former supplier of aircraft support services at Boston's Logan Airport, charged that the Massachusetts Port Authority had violated the Sherman Act by granting another company the exclusive right to supply aircraft services at the facility. The Court's first inquiry was "to consider what sort of body the Authority really is." 362 F.2d at 55. It

[13] Prior to *Goldfarb* several district courts dealt with the issue with mixed results. *See, e.g., Allegheny Uniforms* v. *Howard Uniform Co.*, 384 F. Supp. 460 (W.D. Pa. 1974); *Continental Bus System, Inc.* v. *City of Dallas*, 386 F. Supp. 359 (N.D. Tex. 1974); *Azzaro* v. *Town of Branford*, 1974-2 CCH Trade Cases ¶ 75,337 (D. Conn. 1974); *Trans World Associates, Inc.* v. *City & County of Denver*, 1974-2 CCH Trade Cases ¶ 75,293 (D. Col. 1974).

found the Authority to be "a purely public corporation for public purposes—an arm of the state—analogous to a municipal corporation" which was "acting as an instrumentality or agency of the state." 362 F.2d at 55. With this conclusion and its reading of *Parker* v. *Brown*, the First Circuit held the Sherman Act to be inapplicable to the Authority's actions.

The Eighth Circuit faced a similar question in *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of Missouri-Illinois Metropolitan District*, 433 F.2d 131 (8th Cir. 1970). Ladue, a private bus company, sued a bi-state agency under the federal antitrust laws claiming that it had exercised monopolistic control over the public transportation market and destroyed Ladue's competing business. The Eighth Circuit's inquiry went only so far as to clarify the origin and nature of the bi-state agency. It found "a body politic created by the legislatures of Missouri and Illinois," (433 F.2d at 137) and held that the bi-state agency's activity was not subject to the federal antitrust laws.

In *Padgett* v. *Louisville and Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974), independent taxicab drivers filed an antitrust action against the Air Board for awarding a contract to the Yellow Cab Company to station cabs at the airport. Relying upon *Parker* v. *Brown* the district court dismissed the suit. The Sixth Circuit, agreeing with the district court that the Air Board (a creation of two Kentucky counties) was an agent of the state under the appropriate Kentucky statutes, held the functioning of the Air Board to be beyond antitrust scrutiny.

Likewise, in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973), the Fifth Cir-

cuit confined its analysis to a determination that the defendant was indeed a governmental entity, and finding that to be the case, ruled that the defendant was outside the ambit of the Sherman Act.

These cases indicate that analysis of any legislative mandate to engage in particular anticompetitive acts is unnecessary where the defendant is actually a public body created by the state and operated by public officials who function solely in the public interest."

The pre-*Goldfarb* case dealing most directly and most persuasively with this legislative mandate issue is *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974). In *New Mexico* the Ninth Circuit specifically recognized that in cases where private parties defend on the basis of alleged state authorization it is necessary to determine whether the anticompetitive acts are actually those of the state or

[14] The constitutional and statutory provisions cited in footnote 2, *infra*, establish the Cities' status and authority to operate their utility systems. To the degree that courts have required some inquiry to determine the governmental status of the entity charged, guidance has properly been sought from the constitutional or statutory authority granted to the entity by the state. *See, E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of Missouri-Illinois Metropolitan District*, 433 F.2d 131 (8th Cir. 1970); *Padgett* v. *Louisville and Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974). Suggestions by LP&L in the court of appeals and in its "Brief in Opposition to Petition for Writ of Certiorari" (pp. 17-18), that the decisions of state courts should control questions of an entity's governmental status and liability under federal law are erroneous. Because *Parker* v. *Brown* analysis is ultimately a matter of interpreting the scope of federal statutes, federal law must control. *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F.2d 502 (4th Cir. 1959); *Cf. Jerome* v. *United States*, 318 U.S. 101 (1943).

"a private group masquerading under the banner of 'state action'." 501 F.2d at 369. The *New Mexico* court concluded that "[t]he 'legislative mandate' test is useful, indeed possibly necessary, when there is doubt if the defendant or the regulatory scheme is really an instrument of the state. But when there is no doubt that the defendant is the state, the 'legislative mandate' analysis is unnecessary." 501 F.2d at 370. This language is indeed prophetic of both the *Goldfarb* and *Cantor* decisions where close examination of the state's role, as well as that of the parties charged, was necessary to unmask private anticompetitive action.[15]

The practical problems of applying a legislative mandate test to municipalities can be readily demonstrated. The state constitutional provisions establishing municipalities, and the statutes and municipal charters which define their authority and power are not written with the kind of detail and precision which would be required to meet the Fifth Circuit's standards. Great uncertainty as to antitrust liability is unavoidable since no city will be able to determine positively that its state legislature contemplated the exact conduct that city officials have engaged in or plan. The problem is aggravated by the age of many charters and the almost total lack of published legislative histories available at the state level. The functional

[15] Careful scrutiny was necessary in *Goldfarb* to unmask the actions of private "competing" attorneys pursued under the auspices of the Virginia State Bar. Such inquiries are appropriate where the state authorizes private business to regulate itself. *See, e.g., United States* v. *Texas State Board of Public Accountancy*, Civil Action No. A-76-CA-219 (W.D. Tex., filed November 18, 1976).

result, if the Fifth Circuit's decision stands, will be to place upon the federal courts the burden of second guessing the purposes of state legislatures with little or no objective guidance from any source,[16] and to place the cities and towns of this nation under a great dilemma as to the legality of their acts and the likelihood of treble damage liability.

Few grants of operating authority to municipalities will pass muster under the legislative mandate test. The practice of state legislatures is to give general, not specific, operating authority to their subordinate political entities. This approach is essential to provide local officials with the flexibility of operation necessary to meet local needs and to react to the peculiar and varied situations which arise in their respective municipalities. Under the Fifth Circuit's decision state legislatures will be faced with the enormous task of rewriting the innumerable statutes which delegate power to political subdivisions in specific terms with restrictive consequences, or the prospect of having already beleaguered local treasuries subjected to suits for treble damages by private interests allegedly injured by official action.

2. Subjecting Municipalities To The Antitrust Laws Would Disrupt The Essential Operations of City Government.

The importance of the issue before this Court to the operation of state and local government cannot be exaggerated. Regardless of whether their defense

[16] The opinion below states that "[a] district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent" (App. pp. 55-56), an inquiry which invites prolonged discovery and trials with their concomitant effect on judicial resources.

may ultimately succeed at trial, merely exposing city governments to injunctions, treble damage liability, and perhaps criminal prosecution under the federal antitrust laws will produce enormous uncertainty and hesitancy among public officials and disserve the public interest. The potential for massive damage claims against municipal governments is not an imaginary horrible. In this case, for example, LP&L's counterclaim alleges single damages of $180 million. Even without trebling this is an enormous bill for the Cities' few thousand taxpayers to meet. Elected officials contemplating a course of public action may be unwilling to accept the economic and political risks created by the Fifth Circuit's decision.

While this case involves the operation of municipal electric utility systems, the effects will go beyond this one segment of municipal governmental operation. In response to the requirements of their citizens, cities in this country provide a broad range of services. They run hospitals and clinics, operate public transportation systems, build roads, collect garbage, and provide water and gas to their citizens. Cities operate parks and sewage treatment facilities. They offer educational and a myriad of other social services. Additionally, most cities regulate local business activity through zoning ordinances, the granting of franchises, and the licensing of those who provide certain services. Many of these activities, if conducted by private persons or corporations, might violate antitrust standards. This is true because the many functions of local government often include the exercise of "monopoly" power within local areas. Indeed, the exercise of such power is the essence of government itself.

LP&L has sought to interpose a concept of parity into the analysis of the *Parker* v. *Brown* state action doctrine. It argues that municipalities should not enjoy a "privileged status" free from the antitrust laws if LP&L (a private, investor owned corporation) must toe the mark. (*See,* Brief in Opposition to Petition for Writ of Certiorari at p. 18). This goose/gander argument ignores the statutory language and purpose of the antitrust laws as well as *Parker* v. *Brown* and the entire body of related case law, takes no account of the fundamental differences between private and public bodies, and fails to recognize the substantial policy considerations requiring separate treatment of these unique entities under the federal antitrust laws.[17]

The power of state and local governments is not private power derived from amassed capital or shrewd business practice; it is power derived from

[17] LP&L would make applicability of the federal antitrust laws turn on whether the governmental body was engaged in a proprietary or "profit-making business" activity. (Brief in Opposition to Petition for Writ of Certiorari, p. 18). The *New Mexico* court rejected the argument that a state should be subject to the antitrust laws when it engaged in "business activities". The court held that "[t]he basis (grounded in federalism) for our conclusion that Congress did not intend the Sherman Act to apply to the states does not vary in strength depending on the specific activity in which the state engages." 501 F. 2d at 371-372. Even the court below refused to "import the discredited proprietary-governmental distinction into this area of law." (App. p. 56 n. 8). The circuit courts in *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority, supra,* and *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of Missouri-Illinois Metropolitan District, supra,* likewise rejected this basis for imposing antitrust liabilty upon state governmental bodies. Mr. Justice Frankfurter in *Indian Towing Company* v. *United States,* 350 U.S. 61, 65 (1955), also warned against entering the quagmire of governmental/non-governmental distinctions in applying federal law.

the polity. Applying the federal antitrust laws to the direct acts of public governmental bodies would inhibit the ability of the states and their political subdivisions to exercise their responsibilities and strike a blow at local government and this nation's federalist structure.[18] Indeed, this Court has recently recognized the importance of not interferring with matters of local governmental choice and economic regulation. *City of New Orleans* v. *Dukes,* 427 U.S. 297 (1976).

Unlike private persons, political bodies are, by definition, charged with acting in the public interest. They exist to carry out the popular will and are managed by officials subject to removal from office should the discharge of their duties not conform to the will and expectations of the electorate. The antitrust laws are neither necessary nor appropriate to prevent transgressions by local public authorities. Under our federal system the remedy for abuses of public power by state and local officials traditionally has been left to local law, state and local political action and actions for redress of violations of constitutional rights and limitations. (*See, e.g.,* Blackmun, J., concurring in *Cantor,* 428 U.S. at 612.) The federal antitrust laws, with their provisions for criminal sanctions and treble damage liability, were not designed to curb action by public institutions and should not be applied to interfere with or control the actions of locally elected officials in the discharge of their official functions. Affirmance of the Fifth Circuit would remove decisions of local governments from elected officials

[18] The integrality of the *Parker* v. *Brown* doctrine to constitutional federalism is persuasively argued by Professor Handler in his article, *The Current Attack on the Parker* v. *Brown Doctrine,* 76 Colum. L. Rev. 1 (1976).

and place them in the hands of federal judges in the context of adversary proceedings. Such a drastic restructuring of governmental responsibilities should be steadfastly avoided in the absence of a clear congressional intent to the contrary.

It bears repetition that the federal antitrust laws were enacted to protect the public from abuses of private economic power. *Parker* v. *Brown, supra,* at 351-52; *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 491-93 (1940). The Court in *Standard Oil Company of New Jersey* v. *United States,* 221 U.S. 1 (1911), reminds us that the Sherman Act was passed as a result of "the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization . . . , and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally." 221 U.S. at 50. There is no evidence that Congress intended locally elected officials or the governmental bodies they serve to be subject to prosecution under the federal antitrust laws.

These principles have been accepted law for decades. In that time the Congress has had ample opportunity to alter this construction of the scope of the antitrust laws. The Cities contend that the Fifth Circuit erred when it read *Goldfarb* to require a departure from this accepted interpretation, and submit that this Court should rectify this significant and perilous diversion.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be Reversed.

Respectfully submitted,

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ADDENDUM

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Sherman Act

SEC. 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

SEC. 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act

SEC. 3

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Louisiana Constitution of 1974 (Effective January 1, 1975)

ARTICLE VI. LOCAL GOVERNMENT

PART 1. GENERAL PROVISIONS

Section 7. Powers of Other Local Governmental Subdivisions.

Section 7. (A) Powers and Functions. Subject to and not inconsistent with this constitution, the governing authority of a local governmental subdivision which has no home rule charter or plan of government may exercise any power and perform any function necessary, requisite, or proper for the management of its affairs, not denied by its charter or by general law, if a majority of the electors voting in an election held for that purpose vote in favor of the proposition that the governing authority may exercise such general powers. Otherwise, the local governmental subdivision shall have the powers authorized by this constitution or by law.

Louisiana Constitution of 1921 (as amended)

ARTICLE XIV. PAROCHIAL-MUNICIPAL AFFAIRS

SECTION 40. MUNICIPALITIES; CHARTERS AND POWERS; HOME RULE

(d) The provisions of this constitution and of any general laws passed by the legislature shall be paramount and no municipality shall exercise any power or authority which is inconsistent or in conflict therewith. Subject to the foregoing restrictions every municipality shall have, in addition to the powers expressly conferred upon it, the additional right and authority to adopt and enforce local police, sanitary and similar regulations, and to do and perform all other acts pertaining to its local affairs, property and government which are necessary or proper in the legitimate exercise of its corporate powers and municipal functions.

Louisiana Statutes Annotated (LSA)

R.S. 33:621

The inhabitants of the city shall continue a body politic and corporate by its present name and, as such, shall have perpetual succession; may use a corporate seal which it may alter at will; may sue and be sued; may acquire prop-

erty in perfect ownership or lesser interest by purchase, donation, appropriation, lease, or lease with the privilege to purchase for any municipal purpose, and may also acquire all excess over that needed for all such purposes, and sell or lease such excess with proper restrictions in order to protect and preserve the improvement; may sell, lease, hold, manage and control such property, and make any and all rules and regulations, by ordinance or resolution, which may be required to carry out fully the provisions of any conveyance, or will, in relation to any gift or bequest or the provision of any lease by which it may acquire property; may acquire by condemnation or otherwise, construct, own, lease, and operate and regulate public utilities within or without the corporate limits of the city subject only to restrictions imposed by general law for the protection of other communities; may assess, levy, and collect taxes for general and special purposes; may borrow money on the faith and credit of the city by issue or sale of bonds, notes, or other evidences of debt, on the security of the municipality, or of any improvement or excess property thereof; may appropriate money out of the city treasury for all lawful purposes; may create, provide for, construct, and maintain all things of the nature of public works and improvements; may grant franchises and licenses and fix the terms and regulate the exercise thereof, and no waiver or forfeiture of the power to regulate publicly operated public utilities, may be effected; may levy and collect assessments for local improvements; may define, regulate, prohibit, abate, suppress, or prevent all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the inhabitants of the city, and all nuisances and causes thereof; may regulate and control the use, for whatever purpose, of the streets or other public places; may create, establish, abolish, and organize offices, and fix the salaries and compensations of

all officers and employees except as provided in any applicable civil service laws; may make and enforce local police, sanitary and other regulations; and may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the city and for the performance of the functions thereof. The city shall have all the powers that are granted to the existing municipality by general or special laws; and all such powers, whether express or implied, shall be exercised and enforced in the manner prescribed by this Part, or when not prescribed herein, in such manner as shall be provided by ordinance or resolutions of the commission.

R.S. 33:1326

Any parish or municipality operating a gas, water, or electric light or power system, sewerage plant, or transportation system, may extend such services to persons and business organizations located outside its territorial bounds, or to any other parish or municipality. Such extension shall be in accordance with the terms of service agreements entered into by the parish or municipality supplying the service and the persons, business organizations, parishes, or municipalities receiving the service.

R.S. 33:4162

Any municipal corporation or any parish or any other political subdivision or taxing district authorized to issue bonds under Section 14 of Article 14 of the Constitution of Louisiana of 1921, may construct, acquire, extend, or improve any revenue producing public utility and property necessary thereto, either within or without its boundaries, and may operate and maintain the utility in the interest of the public.

A municipal corporation may lease waterworks systems, electric light and power plants, combined water and electric systems, garbage plants, sewerage works, electric street

and interurban railways, gas plants and distributing systems.

No municipal corporation may lease or purchase gas fields, wells, lands, or holdings for the purpose of drilling and operating gas wells.

A parish may lease gas plants, gas distributing systems, gas wells, gas lands and holdings.

R.S. 33:4163

The municipal corporation, parish, political subdivision, or taxing district may sell and distribute the commodity or service of the public utility within or without its corporate limits and may establish rates, rules, and regulations with respect to the sale and distribution.